

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

)
) File No. 18CV1776
) 19CV1578, 19CV2723
) 21CV2998
) (JRT/HB)
)
)
) Minneapolis, Minnesota
) July 14, 2021
) 10:08 A.M.
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BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE VIA VIDEO CONFERENCE)

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10:08 A.M.

(In open court via video conference.)

THE COURT: This is 21-2998 multi district litigation. I don't have captions yet, so we're going to figure that out as we go along. We also have the former case 18-1776 and the other cases that are part of this that are part of the record.

I don't think we need to go through and note appearances today. That might take us a while. Heather has a handle on that, and we will make sure that we have appearances noted, and if she doesn't have your name down, then you get in touch with her. You should communicate directly with her.

The purpose this morning is really for the Court to get a handle on what is going on so we can start coordinating and get the process moving quickly for the new MDL and also coordinate as much as possible with prior cases.

So on my list really is to focus on what we need to do to get to the initial Case Management Order, some reasonable time limits here, and also to start coordinating discovery with the help of Judge Bowbeer.

Let me hear from everybody here who is wishing to speak. I think I noted here for -- well, maybe you can

1 tell me. Who is going to speak for the plaintiffs? Let's
2 hear from you first on what needs to be done right away.

3 MR. KAPLAN: From the MDL plaintiffs or the class
4 plaintiffs?

5 THE COURT: Let's go MDL first, please.

6 MR. KAPLAN: It's Robert Kaplan. We've exchanged
7 briefing, and if we could have a couple of weeks, I think
8 we could probably agree on most of the dates and the
9 procedures and submit hopefully an agreed upon order to
10 Your Honor. If not, we would note whatever differences
11 there are.

12 THE COURT: Okay. All right. Anyone else in the
13 MDL plaintiffs wish to say anything?

14 MR. GANT: This is Scott Gant. I represent
15 Cisco, and I represent some other plaintiffs that will be
16 filing. As Your Honor may have noted, there are over 80
17 opt-outs from the class action. There was an opt-out
18 notice recently filed, so I'm filing some additional cases.
19 I know others are coming.

20 And we've proposed a schedule to the defendants
21 to attempt to accommodate the expected incoming cases over
22 the next weeks and months. So as Mr. Kaplan said, we would
23 appreciate a couple of weeks to confer with the defendants.
24 One of the issues about which we have disagreed is whether
25 the MDL is going to be separate and coordinated, separate

1 formally but coordinated significantly with the existing
2 action, which in our view is reflected in our papers.

3 The defendants seem to have a view that these
4 matters should be collapsed, which I don't think was what
5 the JPML did in its orders, but once we have that matter
6 settled, I agree with Mr. Kaplan. It's just a matter of
7 weeks and hopefully less for us to submit to you a proposed
8 schedule for the MDL, which will be significantly
9 coordinated.

10 And you will note, Your Honor, we proposed the
11 same fact discovery cutoff for the MDL as exists in the
12 current matter.

13 THE COURT: Okay. Do you have any idea,
14 Mr. Gant, about the number of cases coming, or is that
15 impossible to know?

16 MR. GANT: I will give you my best faith
17 estimate, and you may know, Your Honor, the *Broiler Chicken*
18 matter in Chicago is ongoing. It's similar in some
19 respects. Many of the same counsel who appear for both
20 plaintiffs and defendants are in this case and that case.

21 Many of the same entities that have opted out
22 have filed their own cases in Illinois, which are over 150.
23 So my best guess, Your Honor, is that we are going to end
24 with several dozen, but I can't be more precise than that.

25 I think because in *Chicken* the opt-outs came over

1 the course of a few years. Mr. Kaplan and I were the first
2 two DAPs to file in Chicago, and we did that three and a
3 half years ago. There are still cases being filed here.

4 I think that was partly a function of the fact
5 that there were very small settlements initially and no
6 settlements, which of course is the time when people need
7 to decide whether to opt out. Here, because JBS settled
8 relatively early, and now there is a settlement with
9 Smithfield, Your Honor, I think that people will make their
10 decisions earlier.

11 So I think we won't hopefully face a situation
12 where we have cases filed over years. I think it will be a
13 matter of months for most or all the cases, and I think
14 that will probably be a few dozen would be my best guess.

15 THE COURT: Okay. That's helpful.

16 Okay. Anyone else, plaintiffs, in the MDL that
17 has a thought on this point?

18 How about the class plaintiffs?

19 MR. CLARK: Your Honor, Brian Clark for direct
20 purchaser plaintiffs and for the most part speaking on
21 behalf of the classes, though my colleagues Shana Scarlett
22 and Shawn Raiter have a couple other comments.

23 We do think it would be helpful to confer. We
24 haven't seen the new DAP proposal on things like
25 depositions and such, so some coordination is obviously

1 going to be required. That is the entire advantage of an
2 MDL, and coordinating them before you and Judge Bowbeer, we
3 get those advantages of having the same judges dealing with
4 the scheduling and discovery issues.

5 But a couple issues there that we thought were
6 worth flagging for Your Honor just because they caused us
7 some serious pause as we read through some of the
8 coordination proposals from the MDL DAPs. This case has
9 been going on for three years, and the classes, Puerto Rico
10 and Winn-Dixie, have been in front of Your Honor litigating
11 this case.

12 So there are existing DAPs that were already
13 here, and the classes have been litigating in this case for
14 three years before Your Honor, and we are starting
15 depositions in a few months. We are 45 days from
16 substantial completion of document production, and we need
17 the case to stay on track and keep pushing it forward.

18 And these new direct action plaintiffs, they have
19 chosen, as is their right, three years into the case to
20 file. One of the DAPs that triggered the MDL actually was
21 before Your Honor, if you check your docket, back in
22 December. Then they were dismissed. Then they re-filed in
23 Florida, triggered the MDL, and I think here they are again
24 today in front of you.

25 In that whole time, we have been pushing the case

1 forward, and so we think this kind of fits a pattern that
2 we just want to flag now early on in the case. When there
3 is large numbers of DAPs in a case like this, that just
4 causes some coordination issues that I think are worth
5 putting out there.

6 The DAP counsel have been aware of this case for
7 three years. It's probably a covered case in the media,
8 and as with other large cases with large numbers of
9 opt-outs, the DAPs have chosen to wait until after the
10 motions to dismiss have been successfully defeated for the
11 most part because there was Winn-Dixie and Puerto Rico
12 here.

13 The modification of the pattern here we didn't
14 see in other cases is this kind of side route to the MDL
15 proceedings after the defeat of the motions to dismiss. I
16 don't think anybody ever questioned the outcome of the MDL
17 panel when the case has been proceeding this long, and
18 certainly the MDL panel confirmed these cases are all the
19 same and should all be in front of Your Honor.

20 Again, nothing precludes the new DAPs from doing
21 what they did. I mean, that's their right, but waiting to
22 file until the case is viable and off the ground has some
23 consequences because now the case has proceeded in these
24 three years, the classes, Puerto Rico and Winn-Dixie, have
25 invested considerable time, money and effort to demonstrate

1 that these are viable cases.

2 So I say all that because there is a couple
3 things in the proposals from the new DAPs that cause us
4 pause. One of them is a proposal that the depositions,
5 half of them be led by the new DAPs, who as far as I know
6 don't even have the documents that have been produced, the
7 hundreds of thousands of documents to date. Certainly I'm
8 sure they will get them.

9 We want to start taking depositions on those
10 documents because we have a class certification deadline of
11 February 7 that we intend to meet, and so it is important
12 to us not only to keep, you know, leading in the case and
13 pushing it forward as we have done for three years, but not
14 have kind of, I guess, a new person in the case come and
15 disrupt our ability to litigate this case as we have done
16 for the last three years.

17 But with all that said, we have been and will
18 continue to be able to effectively, logically and equitably
19 coordinate discovery with DAPs. As Mr. Gant said, we do
20 that in lots of other cases. So we can certainly do that,
21 but I guess that proposal kind of came in pretty loud to us
22 for kind of coming into this case three years in.

23 I guess all that is really just another way of
24 saying this is a moving train, and folks need to hop on it.
25 I think that also certainly goes to the proposal to have

1 kind of a separate discovery track. I'm not entirely clear
2 how that will proceed. If there is any proposal to delay
3 those depositions after substantial completion September
4 1st, it's not clear because we are going to have a window
5 between September 1st and February 7th where there are some
6 depositions we will be ready and must proceed on to meet
7 that class certification date.

8 Again, just worth bearing in mind, different
9 discovery protocols, depositions, Winn-Dixie and Puerto
10 Rico were part of that. So it's kind of this weird
11 artificial distinction that I guess has been attempted to
12 be created here by the new DAPs and existing DAPs, and we
13 all are plaintiffs who represent clients who allegedly were
14 victims of a price fixing conspiracy for pork.

15 We all seek to prove that case, and so we need to
16 from the get-go set it up to make it successful and also
17 recognize that we are three years in to doing that. So the
18 two things, kind of substantive things that I think would
19 occur to the classes that we ought to do, substantively as
20 we did in pork early on, having a single ECF number where
21 we file all these cases and having a case caption, whatever
22 it is, that lets us all file in the same matter number.

23 We see orders that are entered that might only
24 pertain -- like we have done all along the way. For
25 instance, we moved for final approval of the JBS settlement

1 on Monday. We just note on the case caption that that was
2 only specific to the direct purchaser plaintiff case. So
3 we think that's appropriate here and have a lot of
4 efficiencies.

5 It can become very difficult to track different
6 matter numbers, like Your Honor knows from the beef and
7 cattle case where I think there is four matter numbers we
8 file motions on each time and you enter orders on each
9 time. So that I think is really important. However you do
10 it, having a single number for all of these cases is
11 important.

12 To the extent the Court today intends to address
13 the new DAPs' proposals on depositions and other things, I
14 think give us a little direction would be helpful on that.
15 Certainly we will talk as we have done for years with these
16 folks and figure it out, but that was the first we saw that
17 struck us that it was a little off key, given we are three
18 years in and about to start depositions.

19 So that's all I had. I think colleagues Shana
20 Scarlett and Shawn Raiter have a couple comments on behalf
21 of their clients.

22 THE COURT: Thank you, Mr. Clark.

23 Ms. Scarlett?

24 MS. SCARLETT: Thank you, Your Honor. Just a
25 couple issues that are very particular to the indirect

1 purchaser class. The DAPs have come into this litigation
2 and ask that there be two separate tracks, the MDL track
3 and the non MDL track, and to us that presents a bit of a
4 dilemma.

5 In other litigation, these exact DAPs have taken
6 the position that the indirect purchasers who seek
7 information through discovery from these DAPs that relate
8 to pass-through and contact information for class members,
9 that the indirect purchasers must seek this information
10 through third-party subpoenas and have made the argument
11 that because the *Chicken* MDL -- the *Chicken* proceedings are
12 not a MDL that we're forced to get all of this information
13 through nonparty subpoenas.

14 And that seems to be the procedure that they are
15 setting up here in the pork litigation. They're acting
16 under the pretense like this is the first day of
17 litigation, when in fact they stopped the MDL. What the
18 indirect purchasers ask is that the entire case be
19 consolidated as an MDL so that we are able to do two
20 things:

21 Number one, that we are able to seek data which
22 relates to pass-through and which relates to our class
23 motion on the same schedule as we need to bring the motion
24 for class certification. You will note in the schedule
25 they propose that they have the date for completion of

1 their structure data in January, with our class
2 certification motions due in February.

3 That simply leaves us not enough time to use that
4 data to perform the pass-through regressions necessary for
5 a class cert motion. In addition, they also ask that,
6 sorry, by their structuring of the MDL with the non MDL
7 portion being the class plaintiffs, we'll also be forced to
8 issue nonparty subpoenas to participate in any deposition
9 of the DAP representatives.

10 In other MDLs, the DAPs have declined to allow
11 the indirect purchasers to ask questions that relate to
12 pass-through and have argued that we have to issue nonparty
13 subpoenas for every deposition despite the fact that all of
14 us are participating in most of the depositions, and this
15 has created another substantial hurdle for the indirect
16 purchaser classes.

17 So for that reason one of the things that we're
18 asking today is that all of these cases are consolidated
19 under the one MDL caption, and I would just point out that
20 the consumer indirect purchaser action was the one first
21 filed. We were the ones that filed in June 2018, and we
22 are the lowest numbered case.

23 So for us to be excluded from participating in
24 these late coming DAP actions is somewhat difficult for us
25 to understand why the DAPs believe this is a reasonable

1 proposal, and I would just like to directly address as
2 well, as my colleague Mr. Clark did, their request that the
3 DAPs be able to lead half the depositions.

4 The direct action plaintiffs and the opt-outs
5 have much smaller cases that they attempt to prove. They
6 have very little interest in proving a conspiracy that
7 impacts the entire market. They usually don't have a lot
8 of interest in demonstrating common impact.

9 Many of their requests in other large MDLs relate
10 to their individual salesperson that negotiated with the
11 defendant and on the other side the individual defendant
12 employee that negotiated with them. This is in direct
13 contrast to what the class is trying to prove, which is a
14 market mechanism and a broader impact at class
15 certification.

16 To allow a DAP to take the lead on half the
17 depositions would gravely prejudice the plaintiff classes
18 from being able to demonstrate what they need to for class
19 certification. In addition, the DAPs are hostile and in
20 conflict with the indirect purchasers when it relates to
21 pass-through.

22 So allowing these entities to step in and take
23 the lead on half of the depositions where they're directly
24 in conflict to what the indirect purchaser classes are
25 trying to show in terms of pass-through through the

1 distribution channels would again be gravely prejudicial to
2 the plaintiffs.

3 So I reiterate what Mr. Clark said. We would
4 like a couple things. One, we want the schedule to stay on
5 track. We are three years into this litigation. We spent
6 an enormous amount of time reviewing the 800,000 documents
7 produced. Substantial completion of documents is almost
8 there.

9 We have all of our teams working incredibly hard
10 to get us ready for depositions and to stay on the schedule
11 that this Court and Judge Bowbeer have ordered. We would
12 ask this Court to consolidate everything under the one
13 caption as an MDL so we are able to use all the discovery
14 tools available us.

15 To the extent that Your Honor can give us
16 guidance on depositions and how you would like the
17 plaintiffs to split the time, I think all of us would
18 appreciate that clarity. Thank you.

19 THE COURT: Thank you, Ms. Scarlett.

20 Mr. Raiter, did you have something?

21 MR. RAITER: Your Honor, on behalf of the
22 commercial indirect purchasers, we join in the comments
23 from the consumers and the direct action, the direct
24 purchaser plaintiffs in the class action cases. Mr. Finley
25 from our group may have a comment about the timing of some

1 transactional data that the DAPs have proposed.

2 MR. FINLEY: Good morning, Your Honor. Blaine
3 Finley of the commercial, institutional and direct
4 purchaser plaintiffs. So I would like to address the Court
5 about third-party discovery briefly.

6 COURT REPORTER: Mr. Finley? Mr. Finley, for
7 some reason you are not coming across as loudly as everyone
8 else did, and you need to slow down for that very reason,
9 please. I am having a hard time. Could you please start
10 over?

11 MR. FINLEY: Absolutely.

12 COURT REPORTER: Thank you.

13 MR. FINLEY: Good morning, Your Honor. My name
14 is Blaine Finley of the commercial, institutional and
15 direct purchaser plaintiffs, and I would like to address
16 the Court on the subject of third-party discovery briefly.

17 My group has several subpoenas issued to DAPs,
18 and these subpoenas preexist the formation of this MDL. In
19 the schedule proposed to this Court by defendants, I noted
20 that December 1st is currently set for the proposed
21 (indiscernible due to audio malfunction) of structured data
22 production.

23 And what my group would propose, and want to be
24 included in the negotiation of, would be bringing forward
25 that deadline in light of the February 7th class

1 certification deadline. Unsurprisingly, structured data,
2 transactional datasets, that the direct action plaintiffs
3 would produce would likely be material in my group showing
4 the price impact to our class numbers, and so to -- in
5 summary, would like to be included in any future
6 negotiations about the schedule going forward, particularly
7 as to the issue of the deadline for the production of
8 structured data.

9 Thank you very much.

10 THE COURT: All right. Thank you. Before we
11 turn to defendants, Mr. Gant, did you want to respond to
12 anything?

13 MR. GANT: I did, Your Honor. Thank you.

14 A couple of points. One is, we did learn some
15 lessons from the *Chicken* litigation, which as Ms. Scarlett
16 corrected herself sometimes is erroneously referred to as
17 an MDL, but it is not. That has caused a lot of
18 complications, and that is what led me and others to seek
19 an MDL in this case.

20 We have worked usually cooperatively with class
21 counsel in the case, but we have had differences with them,
22 and one of the differences we had was our role in taking
23 depositions. We wanted to play in the *Broiler Chicken* case
24 the role that we're contemplating here where we were equal
25 in terms of the time that we were allotted at depositions.

1 In the *Chicken* case, the direct action plaintiffs
2 now represent the majority of the commerce compared with
3 the direct class, and I expect that likely will be the case
4 here, too, as often is the case where there are a large of
5 number of opt-outs. So our clients have exercised their
6 due process rights to file their own cases.

7 Rule 23 and due process contemplate that direct
8 action plaintiffs can file their cases at the time that
9 they believe is appropriate, and that's what we did here.
10 There is no game playing or effort to any -- I think
11 Ms. Scarlett used the word "pretense." There is no
12 pretense, no game playing.

13 We exercised the rights that we have. We don't
14 want to be subordinated to a second class status role. Our
15 clients have significant interests. We're among the
16 largest purchasers, and we are and were fully prepared to
17 litigate this out.

18 As you know, Your Honor, we asked to have this
19 case proceed in a different forum, not because we don't
20 want to be under your stewardship, and we're happy to be in
21 front of you, Your Honor, but in part for the reasons that
22 you're seeing today, which is that the classes want to
23 relegate us to a subordinate status.

24 We want an equal status. We want to be partners
25 with the classes in prosecuting the cases. Our interests

1 are substantially aligned. Ms. Scarlett's suggestion that
2 we're somehow adverse to the indirect classes I don't think
3 is accurate, but if she were right, then as a matter of
4 logic her class is also adverse to the interests of the
5 classes represented by Mr. Clark, Mr. Pouya and
6 Mr. Bruckner, because the class representatives are also
7 direct purchasers.

8 So in terms of the structure of the case, we're
9 in the same position as they are vis-à-vis Ms. Scarlett.
10 We have been able to work out in the *Chicken* case many of
11 the issues that Ms. Scarlett referenced, like whether
12 examinations can be conducted by the indirect classes but
13 witnesses from DAPs.

14 We ended up entering into a stipulation there.
15 We're happy to try and do that here. We're happy to try
16 and come up with solutions, as we did in the *Chicken* case,
17 through stipulations for document productions. Whether
18 this is an MDL or not doesn't change the fact that the
19 relationship between Ms. Scarlett's clients and the direct
20 action plaintiffs were not parties to the same case.

21 Whether you consolidate or coordinate or whatever
22 you do, we are third parties vis-a-vis the cases brought by
23 the indirect classes against defendants, and the proper
24 mechanism for obtaining discovery we believe is subpoenas,
25 but we're happy to discuss that.

1 Fundamentally, Your Honor, we see, we represent
2 large purchasers of these products. We elected to
3 prosecute the case ourselves. We want to cooperate and
4 coordinate with class counsel, and we don't want to
5 interfere with the existing schedule. I said that in my
6 initial comments, Your Honor.

7 Our proposed deadline for fact discovery is the
8 same as exists currently and the schedule that was
9 established by Your Honor in coordination with class
10 counsel and defense counsel.

11 We will be ready to participate fully in
12 depositions when those occur, and we're willing to
13 cooperate and negotiate with class counsel in terms of who
14 does what, but we want to be equal partners, and we want to
15 have the opportunity to protect our clients' interests in
16 prosecuting these cases and not be relegated to a
17 subordinate or second class role.

18 MR. KAPLAN: Your Honor, Robert Kaplan just to
19 follow up. I agree with what Mr. Gant said. As I said in
20 the beginning, if we have a couple weeks, I think we can
21 work out virtually all of these issues. I spoke to
22 Mr. Finley yesterday. I told him, where he explained his
23 issue, I said we will try to work with him.

24 We're not trying to hurt anybody's class
25 certification motion, so we're ready to sit down and try to

1 work out something cooperatively, and I think 90 plus if
2 not all of these issues can be worked out. So if you would
3 give us a couple of weeks, I think we can make a lot of
4 progress on these issues.

5 THE COURT: Well, Mr. Kaplan and Mr. Gant, do you
6 favor a consolidation all into one case, or do you want
7 coordination? What's your view?

8 MR. GANT: Your Honor, my view is that there
9 should be significant coordination but not complete
10 consolidation. First as a formal matter, and sometimes I
11 get accused of trying to queue too closely to the rules,
12 but it seems like class counsel are suggesting that their
13 cases should be put into the MDL, and I don't think that's
14 permitted as a matter of statute, and it's also not
15 consistent with what the JPML order provided.

16 So I think whatever you do, my understanding of
17 the statutory structure is, you can't put everything into
18 the MDL, to the extent that someone is suggesting that. We
19 believe that there should be significant coordination. I'm
20 not necessarily opposed to Mr. Clark's suggestion of the
21 creation of a new number, and that may have constituent
22 parts.

23 It may have the MDL in it. It may have the prior
24 case in it as well, and so for -- I don't want to create
25 inefficiency or wasteful duplication in terms of having to

1 file in multiple dockets, but I do think it's important to
2 continue to recognize that the MDL is separate, and there
3 may be -- I think the wisest course is to have separate
4 schedules because there may be things that affect the MDL
5 that don't affect the other cases and vice versa.

6 So I think having separate schedules, even if
7 they're entered under the same ECF number, makes some
8 sense, but I'm sure Your Honor will have even better ideas
9 than I do about the precise mechanics. The view of the
10 DAPs, and I speak for everyone who has filed on this point,
11 is that we should have significant amount of coordination
12 but not complete consolidation, Your Honor.

13 THE COURT: Okay. Anyone else from the
14 plaintiffs' side before I turn to defendants?

15 Okay. All right. Who is speaking first for
16 defendants?

17 MR. ROBISON: Good morning, Your Honor. This is
18 Brian Robison. I'm with Gibson, Dunn & Crutcher, and we
19 represent Smithfield Foods, and I will be representing the
20 collective group of defendants' position here today.

21 The defendants' calling card for how we integrate
22 these new plaintiffs is efficiency. We want to be
23 efficient in how we're managing the existing cases and how
24 we integrate the new DAPs. A corollary to that is, we want
25 to eliminate duplication. We don't want to have to keep

1 doing the same things over and over.

2 A lot of progress has been made in these cases.
3 Mr. Clark went through some of the high level explanations
4 there, but a lot of progress has been made. The parties
5 have spent a lot of time negotiating the details of
6 discovery, the scope of discovery. There is a lot of sweat
7 equity involved in these cases, a lot of sweat equity
8 invested by the parties but also by the Court.

9 The progress that has been made, the reason why
10 we are just about six weeks away from the date for
11 substantial completion of documents and data productions
12 is, number one, active case management by Judge Bowbeer;
13 and number two, the result of intense negotiations between
14 the existing parties on the scope of discovery.

15 Judge Bowbeer has been hands on from day one.
16 She was hands on during the preservation phase of the case,
17 and she has been just as hands on during the discovery
18 phase. We have had multiple status conferences. She has
19 required multiple status reports. She has decided motions
20 to compel. She has entered orders on stipulations where
21 the parties could agree on the scope of discovery.

22 The parties have negotiated things like the
23 custodian lists for both sides, the search terms that both
24 sides would use in searching for e-mails, the date range
25 for discovery, the scope of data productions, and we have

1 done this obviously for our benefit. The parties need to
2 know the scope of discovery, so we're doing things once.

3 But we also had to do it for the benefit of
4 thirds parties. You've heard a little bit about subpoenas
5 for third parties. There have been dozens of subpoenas
6 served by the existing parties on nonparties, and few of
7 those nonparties had the exact same position I'm advocating
8 today, they wanted to do things once.

9 These nonparties came back to the subpoenaing
10 parties and said, we're happy to comply with the subpoena.
11 We're going to negotiate the scope here and there, but
12 we're concerned when you say you want things like sales
13 data. We're concerned when you talk about pork. What do
14 you mean by sales data, and what exactly is included in
15 pork?

16 So the parties in the case had to reach agreement
17 on the scope of sales data productions and the definition
18 of pork, what exactly is going to be at issue in the case,
19 and then we took that agreement to the third parties so
20 that they could do their searches for e-mails and their
21 searches for data once.

22 That's just an example of what the parties have
23 had to do to get discovery to the point where we are now
24 where we're just a few weeks away from substantial
25 completion of document and data productions. We don't want

1 to waste the benefit of that.

2 We don't want to have to start over and
3 renegotiate things that we've already negotiated. We don't
4 want to have to go back to Judge Bowbeer and talk about the
5 scope of discovery.

6 There are obviously going to have to be some
7 modifications. We're not unrealistic here. We realize
8 we're going to have to add search terms for parties like
9 Cisco and Topco and some of these new direct action
10 plaintiffs. So we realize that there will be additional
11 discovery at some point of some kind.

12 But we do not want to do what we see in the new
13 DAPs' proposal where it does look like they're trying to
14 re-trade some of the agreements on discovery and they are
15 trying to rewrite some of Judge Bowbeer's orders on what
16 the limits of discovery are going to look like.

17 We also agree with Mr. Clark's point about the
18 need for there to be one ECF number and the point that
19 Ms. Scarlett made about consolidation. On consolidation,
20 Your Honor, it is important to understand this has already
21 been addressed in the pre-existing cases.

22 There is a Case Management Order, ECF 85, that
23 was entered early on that talked about consolidation of
24 future cases. That order said if there were future cases
25 transferred to this Court that involved substantially

1 similar allegations of an antitrust conspiracy in the pork
2 industry, those cases would be consolidated with the
3 existing cases.

4 We used that principle later on, ECF 644. Judge
5 Bowbeer had a status conference, I think it was the summer
6 of 2019, where everybody discussed the need to get the
7 Winn-Dixie case and the Puerto Rico case consolidated with
8 the class cases. There had been a lot of confusion up to
9 that point.

10 When an order was entered, was it entered in
11 every case or just certain cases? When there was a status
12 conference, was it going to involve a few cases or all
13 cases? When there were pleadings filed, did they have to
14 be filed once or five times?

15 So Judge Bowbeer did the parties a favor there by
16 clearing that up and consolidating everything for
17 administrative purposes only into one matter, and that's
18 what we think should happen here. If we look at the MDL
19 transfer order, the original transfer order on June 9th,
20 what the MDL panel said was, it was sending the cases to
21 Your Honor's court for consolidated or coordinated
22 proceedings.

23 The way I read that order, the MDL panel left it
24 up to Your Honor, and probably Judge Bowbeer as well, as to
25 how exactly to integrate the cases coming through the MDL

1 process with the cases that have been here for three years
2 now. So we think for administrative purposes these really
3 do need to be consolidated. It will be much easier on the
4 Court to have one filing, rather than five or six.

5 It will be much easier on the parties to
6 understand which orders apply in which cases, which status
7 conferences are going to cover which cases, those sorts of
8 details. Again, this all comes back to efficiency and
9 wanting to do things once rather than multiple times.

10 I agree with everything that has been said about
11 the need for meet and confers. Maybe some of this can be
12 hashed out. This idea of whether there is going to be
13 separate tracks for the MDL cases and the preexisting
14 cases, whether they're going to be consolidated and
15 coordinated in some amorphous fashion, I think that's an
16 important issue we probably need to hash out with Judge
17 Bowbeer on a status conference.

18 THE COURT: All right. Anyone else from the
19 defense, or were you speaking for everyone, Mr. Robison?

20 MR. ROBISON: Your Honor, I believe I'm speaking
21 for everybody on the defense side today.

22 THE COURT: All right.

23 Anything else from plaintiffs that you wish to
24 respond to?

25 MR. GANT: No, Your Honor. Thank you.

1 THE COURT: Okay. Great. All right. Well, we
2 need to get this moving quickly, and I want to move it as
3 quickly as possible in coordination with both the existing
4 cases and the new MDL cases and whatever else comes into
5 the MDL.

6 I think the idea of having, for administrative
7 purposes, one ECF account for filing is a good idea. It's
8 a lot simpler, and we won't have confusion. So we will
9 make sure we set that up.

10 Here's what I would like to do: I would like to
11 see an additional Case Management Order proposed for the
12 MDL. Is a two-week period enough, or do you need more time
13 for that, Counsel?

14 MR. GANT: Speaking for DAPs, two weeks we
15 believe is sufficient, Your Honor. Obviously if we find
16 that that's not enough, we will come back to you and let
17 you know, but my expectation is that that will be
18 sufficient.

19 Thank you.

20 THE COURT: Okay. All right. Ms. Scarlett?

21 MS. SCARLETT: Two weeks would be sufficient,
22 Your Honor.

23 Thank you.

24 THE COURT: Okay. Let's have a draft in two
25 weeks. If there are aspects of it that can't be determined

1 by the parties, you can write short briefing materials on
2 that, and I will decide right away. I would like this
3 order to be as closely resembling the order in the existing
4 case as possible.

5 To me it makes no sense to proceed on separate
6 tracks except on issues that are peculiar to a particular
7 case and not the other. So I would like to see this as
8 close as possible to the existing Case Management Order,
9 and if there is a need to amend the existing Case
10 Management Order to accommodate the addition, additions
11 into the MDL, we can do that.

12 But I would prefer not to do that, and we can
13 address the particulars of who does what at depositions
14 after we get the Case Management Order in place.

15 Does that sound okay?

16 MR. KAPLAN: Yes, Your Honor.

17 MR. GANT: Yes, Your Honor, and just to clarify
18 to make sure we are all working consistent with what you
19 would like us to do, this would be a Case Management Order
20 for the MDL. You asked Ms. Scarlett if that was okay. I
21 just want to make sure there is no confusion. Obviously
22 her clients are not in the MDL.

23 I fully agree we should be conferring not only
24 with defendants who are in the MDL but with the classes who
25 have an interest in the structure of the MDL, but I just

1 wanted to make sure we were on the same page that what you
2 want is a companion or supplemental order for the MDL
3 itself and that we leave intact or modify slightly the
4 existing schedule as needed.

5 Is that what you are suggesting, Your Honor?

6 THE COURT: That's exactly what I'm suggesting.
7 The only reason I asked Ms. Scarlett is I noticed her mute
8 button was off, so I suspected she had something to say. I
9 try to check out the mute buttons, although I apologize for
10 not noting my own at the beginning of the hearing today.
11 Sometimes that happens.

12 MS. SCARLETT: Your Honor, there is a reason why
13 I unmuted is just because the schedule in the DAP case does
14 impact the class cases. Because of that deadline for
15 structured data, that dramatically impacts our ability to
16 prepare for class certification and keep on track in our
17 cases.

18 For that reason, the classes would like to be
19 included and have some input on that.

20 MR. KAPLAN: Your Honor, I said that I spoke to
21 Mr. Finley yesterday, and it applies to Ms. Scarlett.
22 We're going to work that out. We're not going to interfere
23 with their class certification.

24 THE COURT: Okay. Good. And once we get that in
25 place, then we can address some other issues relative to

1 the MDL. If we need coordinating counsel, those kinds of
2 issues, we can address that, and you can address it in the
3 draft Case Management Order if you wish, but I would like
4 to get the schedule on track right away.

5 That's the critical point for getting moving. My
6 anticipation is, you know, not consolidating the two sides
7 of this case into one but coordinating it very closely so
8 that we're basically on the same track for everything.
9 That would be my intent.

10 All right?

11 MR. GANT: Thank you, Your Honor.

12 THE COURT: Anything else anyone has today? And
13 I will coordinate also with Judge Bowbeer so we're on the
14 same path here as well. So I appreciate your joining me
15 this morning and getting me up to speed on where we're at.
16 If I could have that draft order two weeks from today, I
17 would appreciate it.

18 If you run into difficulties or there is anything
19 else, you know, just be in touch, and we'll take care of
20 it. All right?

21 MR. GANT: One final question, Your Honor. How
22 would you like it submitted? You referred to it as a
23 draft. So you want us to file it on the docket or submit
24 it to chambers?

25 THE COURT: Submit it to the chambers e-mail box.

1 MR. GANT: Will do. Thank you, Your Honor.

2 THE COURT: And we'll work at making sure we have
3 an order relative to a single filing for everything. All
4 right?

5 MR. KAPLAN: Thank you, Your Honor.

6 THE COURT: Okay. Thank you, everyone.

7 **(Court was adjourned.)**

8 * * *

9 I, Kristine Mousseau, certify that the foregoing
10 is a correct transcript from the record of proceedings in
11 the above-entitled matter.

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15 Certified by: s/ Kristine Mousseau, CRR-RPR
16 Kristine Mousseau, CRR-RPR

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